U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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DATE: 5/16/01
CASE NO.: 2000 - INA - 166

In the Matter of:
POLTEAM CONSTRUCTION CORPORATION,
Employer,

on behalf of

JAN PIECUCH,
Alien.

Appearance: B. Tomasz Maj , Esq.
Brooklyn, NY

Certifying Officer: Dolores DeHaan
New York, NY

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Jan Piecuch ("Alien") filed by Polteam Construction Corporation ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, New York City, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on March 21, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a ground of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On January 30, 1996, Employer field an application for alien labor certification to allow it to fill the position of "Blacksmith" in its Brooklyn, New York, construction firm. The duties of the position were described as:

> Forging and repairing variety of metal articles, machines, structural components. Heat metal in furnace, and hammer stock into specified shape and size. Forge metal parts by heating and hammering them together. Draw plans and copy new patterns used in assembly of metal fences and gates. Cutting, assembling, welding of metal parts using arc/acetylene welding equipment.

Four years of experience in the offered job were required. The wage offered was $26.00 per hour, for a 35 hour week. (AF 50).

Employer advertised the position in a local newspaper, and posted the job on the premises as required. The results of recruitment were first reported on June 19, 1997. Two applicants responded to the advertisement; both were rejected after being sent a questionnaire inquiring into their blacksmithing experience. One applicant did not respond, and the other did not have the requisite 4 years experience. (AF 23-24). A third referral was obtained from the Iron Worker Local Union No. 455 ("Local 455"), which Employer was instructed to contact in an April 7, 1997 letter from the New York Department of Labor ("NYDOL"). Employer contacted Local 455 on June 18, 1997, and received the referral on June 20, 1997. (AF 15). An extension to report the results of this contact was requested and granted (AF 30), and in a supplemental report dated July 18, 1997, Employer reported that although Mr. Jordan had been scheduled for an interview on July 17, he failed to appear or contact Employer. (AF 40).

A Notice of Findings ("NOF") was issued on July 7, 1999 which proposed to deny labor

certification. The CO found that Employer's actions in seeking referrals from Local 455 and its attempted contacts with Mr. Jordan were "tantamount to rejection for other than lawful job related reasons. The CO detailed the chronology of events, and raised questions regarding the Employer's account. Employer was instructed to respond to the CO's chronology and to supply documentation of attempted contacts with the applicant. (AF 55-57).

Employer filed a Rebuttal on September 15, 1999; an extension had been requested and granted. Employer explained that an office error had caused the last minute contact by fax, but that once the fax was sent, Mr. Jordan should have contacted Employer. Employer also set forth a new reason for the rejection, based upon its investigation of the applicant's "impressive list of achievements showing his extraordinary qualifications as an Artist/Blacksmith." Employer was surprised that such a person would want to do the more mundane work the job opportunity entailed. It was reported that there was no record of Mr. Jordan attending the school he claimed to have graduated from, and that there was no record of his operation of one of the smithies he reported working at. Documentation included a phone record showing faxes to Mr. Jordan's number on July 15, 1997 and a letter from the Harwich, Massachusetts, town clerk which states that there was no business certificate on record for the Cape Cod Colaborative [sic] Blacksmith Shop. (AF 58-66).

A Final Determination ("FD") denying labor certification was issued on October 21, 1999. The CO found that the Employer had failed to adequately respond to the cited deficiencies. The explanation of an "office error" did not sufficiently account for the delay in contacting Mr. Jordan. The CO did not consider the evidence regarding Mr. Jordan's qualifications, as this did not alter the fact that the applicant was not afforded a timely opportunity for interview. (AF 67-69).

Employer filed a Request for Reconsideration and, in the alternative, a Request for Administrative Review on November 24, 1999. It was argued that the Employer had contacted the applicant in a reasonable time, which was acceptable because the NYDOL had not offered a specific time frame in which to make contact. Employer maintained that the methods of contact (phone, fax, and letter) were reasonable under the circumstances, and lead to the conclusion that the applicant was no longer interested in the job. (AF 77-78).

The CO denied reconsideration and forwarded the file to BALCA on appeal. (AF 79).

Discussion

We find that the Employer's actions during recruitment were tantamount to a rejection of a qualified U.S. worker for other than lawful reasons. While the Employer is correct that the timeliness of contact will be judged by a reasonableness standard in light of all circumstances, Employer has here failed to show any reasonableness in its actions. Employer was first notified of the need to contact Local 455 on 4/7/97, in a letter from the NYDOL. (AF 6-8). On May 21, 1997, when the NYDOL forwarded the resumes of two applicants from newspaper advertisements, Employer was informed that contact should be made "**within 2 weeks.**"

(emphasis in original). (AF 13). Employer therefore was informed directly of what time frame was considered reasonable. There was no need to decipher hidden instructions, as Employer accuses in its appeal.

Employer did not even contact Local 455 for referrals until two days before the June 20, 1997 deadline for reporting recruitment results. This was blamed on "the office failure." Interestingly, two days before, Local 455 had contacted NYDOL two days prior, on June 16, to inform them that Employer had not yet made contact. Local 455, in response to a fax from Employer which cited a pending deadline and a need for haste, faxed Mr. Jordan's resume to Employer on June 20. Employer, however, did nothing with that information until July 15, 1997, when it sent him a fax at his office or home in Massachusetts informing him of an interview the next day[1]. The submitted records show four faxes sent within minutes of each other to Mr. Jordan. (AF 63). The obvious conclusion is that there was some problem faxing the one page letter to the applicant, yet there is no evidence that the Employer attempted any other phone contact, even though it possessed two additional phone numbers for the applicant.

Finally, the letter which was sent to the applicant informing him of the interview was mailed, according to the postage on the envelope, the day of the interview. (AF 41). It is absolutely impossible for the mailed letter to have constituted any meaningful contact with the applicant. Employer points out that the applicant did not contact it at any point, but the letter and fax to the applicant are termed in such a way as to discourage any contact. Employer informed the applicant of when and where to show up, and required that all questions or scheduling changes must be done by writing to the Employer "at our office." This instruction is emphasized with italicized print, boldface, and capitalization. To complicate matters further, the address listed on the letterhead is different than that given in the body of the letter as the address of the "new office." It is unclear to which office the applicant should write.

We find that the actions by the Employer in delaying contact with the union and then in delaying contact with Mr. Jordan were entirely unreasonable. Citing office errors (twice) is an inadequate explanation, especially in the circumstances of this case. Employer was aware that two weeks was the benchmark for making contact with applicants, but appears to have consciously avoided utilizing the best source for possible applicants until the last minute. As the CO noted, we do not consider the later evidence offered to show that Mr. Jordan was not as qualified as his resume indicates. This does not change the fact that Employer engaged in activity designed to avoid any meaningful interview process. Further, we note that the investigation into Mr. Jordan's background apparently took place after the issuance of the NOF, and certainly long after Mr. Jordan was rejected in 1997. The letter from the Harwich town clerk is dated July 16, 1999. The rejection of Mr. Jordan therefore was not caused by any of the reasons cited in Employer's Rebuttal.

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[1]One copy of a letter sent to "Applicant" bears an interview date of July 17; this was submitted with Rebuttal. The letter submitted with the supplemental recruitment report has the date of July 16.

Order

Based on the foregoing, the Final Determination of the CO is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.